IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 78

JOSEPH M. TAUSSIG,
Petitioner,

vs.

HONORABLE JOHN P. BARNES, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF ILLINOIS.

REPLY OF PETITIONER TO BRIEF OF AMICUS CURIAE.

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INDEX.

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FOREWORD.

Certain errors and misstatements of fact appear in the Brief of *Amicus Curiae*:

1. Contrary to the assertions of *Amicus Curiae*, pages 2-3, Petitioner has grounded this petition upon one of four points originally urged: that the District Court was without jurisdiction, in that no diversity of citizenship exists to give that court jurisdiction upon which to proceed; the result is that all of its judicial determinations are void, save that finding the citizenship of the parties, and are expungable by mandamus, here sought.

2. *Amicus Curiae* has gone beyond the record and the facts in denying that a purported waiver by the petitioner of rights of appeal below was invalid. While *Amicus Curiae* does not deny that one of them misrepresented his fee arrangements with the Plaintiff below, it infers in its Brief, page 10, that Petitioner received an Executor's fee of $15,000 as consideration for the purported waiver and dismissal of Plaintiff's Petition To Remove The Executor (Petitioner) in the Probate Court of Cook County. Actually, the $15,000 was never paid. Yet, one of the Plaintiff's attorneys, who is here one of the *Amicus Curiae*, has filed another Petition To Remove The Executor (Petitioner) on behalf of the Successor Trustee, and also Objections to the payment of the said Executor's fee of $15,000, which is still unpaid. Said Petition To Remove and said Objections, are now pending in said Probate Court.

Petitioner was and is correct in stating, at Page 11 of his Petition for Certiorari, that "the parties have themselves ignored the purported waiver for the nullity that it is."

3. *Amicus Curiae* goes outside of the record on two other occasions: (1) on pages 11, 12 and 14, of its Brief it inserts self-serving portions of purported arguments made by it and other counsel before the District Court; and (2) in its Brief, page 20, refers to a third party proceeding, by Petitioner in the District Court, wherein a separate decree was entered which is subject to the identical fatal lack of jurisdiction as that before this Court in the Petition. What is an apparent inconsistency is of no moment here for that appeal is the only means available to Petitioner for the protection of his right of appeal in that third party proceeding and the holding of that matter in abeyance pending the determination of the jurisdiction question by this Court.

4. The remarks of *Amicus Curiae*, pages 20-1, its Brief,

anent the character of Petitioner, are unwarranted and out of place in its Brief.

Our Reply follows the sequence of the Brief of Amicus Curiae.

I.

The Seventh Circuit Court of Appeals Has Rendered a Decision in Conflict with the Decisions of Other Circuit Courts of Appeals on the Same Matter.

Petitioner will allow his citations of authorities under this Point to stand against those of *Amicus Curiae* without further comment thereon. However, *Amicus Curiae* has made the point that the District Court had "discretion" to acquire jurisdiction of the parties and matter, or not to do so, by realigning, or by not realigning, the parties in accordance with its discretion regarding their respective citizenships and real interests. Not only is this a false issue, but is something that *Amicus Curiae* must prove from the mandatory record to the satisfaction of this Court.

Notwithstanding the assertions of *Amicus Curiae*, the record itself proves that the District Court did not have jurisdiction on the only ground asserted, that of diversity of citizenship. Also, the Court's own decree on that point contradicted certain of its findings with regard thereto. (See Point II c, *infra.*) In essence, the District Court transcended the jurisdiction accorded to it under the statutes, (28 U. S. C. A. 41 and 80), as appears more fully under Point II c of our Main Brief.

II.

The Seventh Circuit Court of Appeals Has Decided Federal Questions in a Way Probably in Conflict With Applicable Decisions of This Court.

A. Petitioner relies upon the discussion of this point in his Main Brief. In its reply thereto, *Amicus Curiae* have merely specified certain functions of mandamus, all of which, together, are the means whereby a court requires officials, official bodies and inferior courts to perform their respective duties within, rather than without, their respective spheres, each sphere being determined by the law governing the functions of each. And in replying to a mandamus, each respondent has the opportunity to support its questioned action, by citing fact and law, rather than by mere assertion, as is here being attempted by *Amicus Curiae*.

B. In *Hill* v. *Walker*, 167 Fed. 241, appears a discussion, too lengthy to quote here, on the meaning of "discretion" with regard to the determination of jurisdiction on "diversity" grounds and also with regard to the determination of parties who are plaintiff and defendant. It points out that "jurisdiction" is not a vague undeterminable thing, varying with individual judges, but that it is and must be "a legal certainty", provable and determinable from the facts affecting citizenship and interest. These become part of the mandatory record, which supports, or fails to support, the judgment of the court on review.

In *Thomson* v. *Butler*, 136 Fed. 2nd. 644, (certiorari denied, 320 U. S. 761), the court said, page 647:

> "For purposes of testing the jurisdiction of federal courts on the basis of diversity of citizenship, it is immaterial how the parties may have been designated

in the pleadings, *since the court must align them for jurisdictional purposes on the basis of their actual legal interests and the apparent results to them, if the object sought to be accomplished by the litigation is successful.* (Citing cases.) * * * Since all of the parties were not citizens of different states from all of the parties on the other side, the court necessarily *was obliged* to hold that it had no jurisdiction of the suit on the basis of diversity." (Citing cases.) (Italics added.)

It is submitted that the District Court, in the case at bar, did not align the parties, in accordance with its duty and the proof before it, else it would have dismissed the complaint.

It is not gainsaid that the fundamental issue was the return of trust property to the trustee, one of whom had bought it, with the silent acquiescence of the other trustee. It is inescapable that, in arranging the parties here according to their respective interests, the trustees, are on one side as defendants, and all of the other parties are on the other side, as plaintiffs. (See Main Brief, page 6.) Yet, such was not the determination of the District Court, which, according to page 10, Brief of *Amicus Curiae,* arrived at a different result by the exercise of its "discretion". But that result does not stand the test of the requisite "legal certainty".

Quite recently, this Court has reiterated the law determining jurisdiction in diversity of citizenship cases, *Indianapolis et al.* v. *Chase National Bank,* 314 U. S. 63, 69:

"Diversity jurisdiction cannot be conferred upon federal courts by the parties' own determination of who are plaintiffs and who defendants. It is our duty, as it is that of the lower federal courts, to 'look beyond the pleadings and arrange the parties according to their sides in the dispute.' *Dawson* v. *Columbia Trust Co.,* 197 U. S. 178, 180. Litigation is the pursuit of practical ends, not a game of chess. Whether the

necessary 'collision of interests,' *Dawson* v. *Columbia Trust Co., supra,* at 181, exists, is therefore not to be determined by mechanical rules. It must be ascertained from the 'principal purpose of the suit,' *East Tennessee, V. & G. R.* v. *Grayson,* 119 U. S. 240, 244, and the 'primary and controlling matter in dispute,' *Merchants' Cotton Press Co.* v. *Insurance Co.,* 151 U. S. 368, 385. These familiar doctrines governing the alignment of parties for purposes of determining diversity of citizenship have consistently guided the lower federal courts and this Court."

And at page 76, it continues:

"The fact that Chase prefers the adjudication of its claim by the Federal court is certainly no reason why we should deny the plain facts of the controversy and yield to illusive artifices. Settled restrictions against bringing local disputes into federal courts cannot thus be circumvented. * * * The policy of the statute [conferring diversity of citizenship jurisdiction upon the district courts] calls for its strict construction."

The correct solution of the problem in the instant matter appears in an opinion involving a similar state of facts, wherein several trustees were sued in an effort to have one of them return trust property to the trust, and there the court said, *Backer* v. *Levy,* 82 Fed. 2nd. 270, 274:

"If thus aligned, the court would be ousted of jurisdiction, since the [indispensable parties] are citizens of the same State as the defendant Levy. Therefore, in any event, a suit in the District Court must fail. But, if the complainants have a good cause of action, they will lose no rights because they may apply to the Surrogate of New York County under section 259 of the New York Surrogate's Court Act for a general compulsory accounting by the trustees, or they may bring suit in the State Supreme Court if the trustees refuse, after demand, to take action. We can see no justification for resorting to the federal court in such a case as this."

It is suggested, to this Court, that litigants in Illinois have similar rights for similar purposes.

C. Leo Taussig's citizenship, as well as that of all other parties to the proceeding must be determined by the facts and proof before the District Court. This is true also of all of the other parties to the suit. On the basis of the showing made on both interest and citizenship, the parties must be aligned, in accordance with the duty imposed on all federal courts, and the "familiar doctrines governing the alignment of parties for purposes of determining diversity of citizenship." (*Indianapolis* v. *Chase National Bank*, 314 U. S. 63, 69.)

Leo Taussig was an indispensable party according to Paragraphs 11 and 14 (R. 58, 59) of the complaint filed by the plaintiff, as follows: Petitioner "has depleted the available funds for the support and maintenance of Leo Taussig, an incompetent"; "Plaintiff brings these proceedings on behalf of himself and on behalf of each and every one of the other beneficiaries * * * except [Petitioner]" (R. 59).

Yet, in the face of this record *Amicus Curiae* insists Leo Taussig's interest is opposed to that of Plaintiff below!

The will attached to the complaint (R. 58) made uncontrovertable that Leo Taussig's interest was the regaining by the trust of the removed property, along with the interests of the others who were to benefit thereunder. Opposed to his interest and theirs, was the Petitioner; his interest lay in keeping the property for himself. This is made clear by the complaint, particularly by the prayer (R. 60-1) and the answers of both Leo Taussig (R. 332) and Petitioner (R. 58-68). Leo Taussig's interest, as well as that of all other parties, save the Petitioner and Irving Robitshek, and other trustee, was to get and share that which Petitioner wanted to keep and not to share.

The Court first found that Leo Taussig was a citizen of Wisconsin, (R. 168) but later corrected this error of fact by finding him to be a citizen of Illinois, at the time the suit was filed (R. 200).

Similarly, Fannie Daus was admitted to be a citizen of Illinois and should have been a plaintiff (R. 192, 200).

Leontine Robitshek was situated similarly to Leo Taussig: claiming a share in what Petitioner wanted to keep (R. 201). She was a citizen of Illinois and properly she should have been a plaintiff (R. 170).

The deaths of Leo Taussig and Fannie Daus, during the pendency of the suit could not remedy the patent lack of jurisdiction; diversity is bottomed on facts and on the state of things at the time the suit is brought. (*Mullen* v. *Torrance,* 9 Wheat. 537, 538; *Anderson* v. *Watt,* 138 U. S. 694; *Clarke* v. *Mathewson,* 12 Pet. 164.)

All of the cases mentioned by *Amicus Curiae,* pages 15-16, save *Sutton* v. *English,* are not in point here, because courts are well aware that corporations are susceptible of manipulation for an illegal purpose. There is no suggestion that that is the case with Leo Taussig, Fannie Daus or Leontine Robitshek.

The *Sutton* case is not in point, for that merely points out that a sole beneficiary under a will would not be interested in annulling it, and that under Texas law no federal court has jurisdiction to annul a will there.

Patently the District Court was without diversity jurisdiction, the only one possibly asserted. Hence, under the "familiar doctrines" reiterated in *Indianapolis* v. *Chase, supra,* that court had authority only to realign the parties and dismiss the complaint for want of jurisdiction.

III.

The Seventh Circuit Court of Appeals Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be Settled by This Court.

It must not be overlooked that *Roche* v. *Evaporated Milk Association,* 319 U. S. 21, was a criminal case. It deals with certain issues raised by a decision of the trial court upon pleas in abatement concerning the validity of certain action of the grand jury. With these matters we are not presently concerned. However, on jurisdiction, that opinion says, at page 26:

> "But the present case involves no question of the jurisdiction of the District Court. Its jurisdiction of the persons of the defendants, and of the subject matter charged by the indictment is not questioned."

And no words of Petitioner can add force to the pronouncement at page 25 that mandamus is available for the exercise of appellate jurisdiction, as Petitioner has maintained to be the law:

> "Its authority [the Circuit Court of Appeals] is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected. Otherwise the appellate jurisdiction could be defeated and the purpose of the statute authorizing the writ thwarted by unauthorized action of the District Court obstructing the appeal." (Citing cases.)

And, following, on page 26, is this:

> "The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when its duty is to do so." (Citing cases.)

And on page 32 of that same opinion, the Court points out two functions of mandamus, one of which is commonly overlooked:

> "Thus is the two cases [*Ex parte Simons*, 247 U. S. 231; *Ex parte Skinner & Eddy*, 265 U. S. 86] in which the writ was granted, it was issued in aid of the appellate jurisdiction of this Court to compel an inferior court to relinquish a jurisdiction which it could not lawfully exercise or to exercise a jurisdiction which it had unlawfully repudiated."

It is patent that a proceeding carried forward by a District Court without jurisdiction or beyond its jurisdiction is no ordinary matter. Contrariwise, such a departure by a District Court from its statutory boundaries is an extraordinary fault, demanding and requiring and receiving, in other Circuits, the promptest of correction by mandamus. (Main Brief, points I and II.)

Ex Parte Harding, 219 U. S. 363, is not in point here: it turned on a question of citizenship being decided after hearings "which extended over a period of fifteen months" (page 369) and also that the District Court had had a full and complete hearing and proof establishing the requisite diversity ground for jurisdiction. And it was a removal case.

Mandamus is properly used to halt a court from transcending its jurisdiction despite the assertion that the court, having exercised its jurisdiction in taking the case, cannot be required to relinquish it save by appeal of error. For the law is that mandamus is proper, in this specific legal inquiry, without resorting to, or being forced to wait for other and slower means of review. *Grable* v. *Killits*, 282 Fed. 185.

Des Moines Navigation & Railroad Co. v. *Iowa Homestead Co.*, 123 U. S. 552, is of no aid here; it was decided on this point, at page 558:

> "But the record shows, with equal distinctness, that all the parties were actually before the court, and made no objection to the jurisdiction."

Which is not the situation herein, where objections to the jurisdiction of the court were made continually.

Stoll v. *Gottlieb*, 305 U. S. 165, stands for the proposition that the guarantor of bonds of a building corporation in reorganization in the bankruptcy court, which had voided the guarantee as part of the reorganization, could not be sued in the state court on that guarantee. The opinion added, in a note, page 171:

> "We express no opinion as to whether the Bankruptcy Court did or did not have jurisdiction of the subject matter."

The decision has no application at bar, for the opinion states, page 170:

> "But where the judgment or decree of the federal court determines a right under a federal statute, that decision is 'final until reversed in an appellate court, or modified or set aside in the court of its rendition'."

More important, the Stoll opinion specifically states that matters of status of persons and titles to real estate are not considered to be governed by that decision, for it states, page 76:

> "To appraise the cases dealing with status and transfer of title to real estate seems outside the scope of the present inquiry. The rule applied here may or may not be applicable in instances where the courts with jurisdiction of the later controversy are passing upon matters of status and real estate titles."

The case at bar is within the exceptions specified, since it involves the matter of removal of a trustee (R. 205) as well as transfer of title to real estate (R. 206).

IV.

The Seventh Circuit Court of Appeals Has So Far Departed From the Accepted and Usual Course of Judicial Proceedings, or So Far Sanctioned Such a Departure by a Lower Court, as to Call for an Exercise of the Court's Power of Supervision.

In precisely such a factual situation as this *Grable* v. *Killits,* 282 Fed. 185, 195, is applicable and determinative. Fundamentally the issue herein is simple. Jurisdiction of a court is a matter of proof made up of determinable facts and the application of the law to them. Jurisdiction of the subject matter cannot be conferred or waived; it does or does not exist. Equally, once the requisite diversity ground is asserted it must be determined to a "legal certainty" and cannot be a matter of conjecture. Nor can it be determined by the court's "discretion." That can be abused.

By statute, the District Court has been created and its jurisdiction specified and determined. To require that the Court act, within its defined jurisdiction, is one of the functions performed by the extraordinary writ, mandamus. The instant case is an extremely apt example of the necessity, availability and application of mandamus.

In sum, the question here is whether jurisdiction shall depend upon statutory requisites, yielding "a legal certainty," or whether *Amicus Curiae* shall succeed in making jurisdiction depend upon the "discretion" of the District Judge, whoever he chances to be. Or as has been better said:

> "The most odious and dangerous of all laws would be those depending upon the discretion of judges. Lord Camden, one of the greatest and purest of English judges, said 'that the discretion of a judge is the law

of tyrants, it is always unknown; it is different in different men; it is causal, and depends upon constitution, temper and passion. In the best it is often times caprice; in the worst, it is every vice, folly and passion to which human nature can be liable.' Courts cannot go beyond their defined powers to avoid the hardship of cases." (*State* v. *Cummings*, 36 Mo. 273, 278.)

Conclusion.

While it is true that litigation should end, it is more important that it end justly and in accordance with the applicable law.

Respectfully submitted,

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August 30, 1948.